August 12, 1999

In the Matter of:		
James M. Brandes Claimant		
v.		
	Case No.	1999-LHC-1016
Electric Boat Corporation Employer/Self-Insurer		
	OWCP No.	1-139241
and		
Director, Office of Workers' Compensation Programs, United States Department of Labor Party-in-Interest		

Appearances:

David N. Neusner, Esq.
For the Claimant

Lance G. Proctor, Esq.
For the Employer/Self-Insurer

Merle D. Hyman, Esq.
Senior Trial Attorney
For the Director

Before: **DAVID W. DI NARDI**
Administrative Law Judge

DECISION AND ORDER - AWARDING BENEFITS

This is a claim for worker's compensation benefits under the Longshore and Harbor Workers' Compensation Act, as amended (33 U.S.C. §901, **et seq.**), herein referred to as the "Act." The hearing was held on July 1, 1999 in New London, Connecticut at which time all parties were given the opportunity to present evidence and oral arguments. Post-hearing briefs were not requested herein. The following references will be used: TR for the official hearing transcript, ALJ EX for an exhibit offered by this Administrative Law Judge, CX for a Claimant's exhibit, DX for

a Director's exhibit and RX for an Employer's exhibit. This decision is being rendered after having given full consideration to the entire record.

Post-hearing evidence has been admitted as:

Exhibit No.	Item	Filing Date
CX 8	Notice relating to the taking of the deposition of Dr. Cambridge on July 14, 1999	07/02/99
CX 9	Attorney Neusner’s letter filing his	07/26/99
CX 10	Fee Petition	07/26/99
RX 5A	Attorney Proctor’s letter filing	07/28/99
RX 5B	Form LS-202, dated November 7, 1977	07/28/99
RX 6	Form LS-202, dated January 19, 1998	07/28/99
RX 7	Form LS-202, dated January 22, 1998	07/28/99
RX 8	Yard Hospital Records from the Employer’s Yard Hospital from September 6, 1983 to April 9, 1987 (21 pages)	07/28/99
RX 9	Employer’s comments on the fee petition	07/30/99

The record was closed on July 30, 1999 as no further documents were filed.

Stipulations and Issues

The parties stipulate, and I find:

1. The Act applies to this proceeding.

2. Claimant and the Employer were in an employee-employer relationship at the relevant times.

3. On August 23, 1996, Claimant suffered an injury in the course and scope of his employment.

4. Claimant gave the Employer notice of the injury in a timely manner.

5. Claimant filed a timely claim for compensation and the Employer filed a timely notice of controversion.

6. The parties attended an informal conference on January 27, 1999.

7. The applicable average weekly wage is $1,071.39.

8. The Employer voluntarily and without an award has paid temporary total compensation from November 27, 1996 through the present and continuing, for a total of $96,425.10 as of June 29, 1999. The medical benefits thus far total $976.30.

The unresolved issues in this proceeding are:

1. The nature and extent of Claimant's disability.

2. The date of his maximum medical improvement.

3. The applicability of Section 8(f) of the Act.

Summary of the Evidence

James M. Brandes ("Claimant" herein), fifty (50) years of age, with a high school education and an employment history of manual labor, began working on July 10, 1974 as a rigger at the Groton, Connecticut shipyard of the Electric Boat Company, then a division of the General Dynamics Corporation ("Employer"), a maritime facility adjacent to the navigable waters of the Thames River where the Employer builds, repairs and overhauls submarines. Work as a rigger is the most physically-demanding job at the shipyard as it essentially requires that Claimant move equipment, machinery and other items which, because of union rules or regulations, cannot be moved by any of the trades at the shipyard. These are usually heavy items and he works with the crane operators, for example, to move these items anywhere on the boats or throughout the shipyard as needed. He uses chainfalls, shackles, clamps, wrenches and wires to move these items, Claimant remarking that a chainfall weighs 60-70 pounds, shackles from 1-75 pounds, pumps from 50 to 100 pounds. (TR 17-22; RX 5)

A shipyard strike occurred on June 30, 1975 and he was out of

work until March 29, 1976, at which time he was recalled to work as a rigger, and his seniority was retroactive to March 16, 1975. (RX 5-1)

Claimant injured his left leg on November 4, 1977 (RX 58) when a heavy foundation fell on it, fracturing his leg just above the ankle in two places, while he was rigging chainfalls. Claimant was brought to the Lawrence and Memorial Hospital where he was treated by Dr. William N. Jones, an orthopedic surgeon, by "manipulative reduction and casting under general anesthesia for the comminuted fractures sustained involved the left lower leg." (CX 7) Claimant's fracture did not heal properly and he was readmitted to L&M on August 29, 1978 and underwent iliac bone grafting to the left distal tibia and the application of a long leg cast. He was discharged on September 6, 1978 as improved. (CX 6 at 1-7) He was out of work for about thirteen (13) months and returned to work as a rigger. Surgery was required in 1979 to insert a steel rod in his left leg – from the knee to the ankle – as the bone graft did not work and the rod had to be surgically corrected as it had moved in 1983. The rod was removed in 1985. (CX 4; TR 23-24)

Claimant's November 4, 1977 shipyard accident also resulted in a torn medial meniscus and he underwent arthroscopic surgery therefor on January 11, 1985. (CX 5) Claimant was out of work for various periods of time due to that injury and he was paid appropriate benefits therefor. He actually returned to work as a "crane walker" and had duties of directing the movement of the huge shipyard cranes by a two-way radio. He acted as the so-called eyes-on-the-ground for the crane operator seated in the cab of his crane one hundred or more feet above the ground. He did that light duty work for about five years but the prolonged walking and standing on concrete aggravated his chronic left leg problems and he then returned to work as a rigger. He was able to perform his duties but certain work activities, such as climbing ladders, worsened his symptoms. (TR 24-28; RX 5)

Claimant's back problems began with a shipyard injury in 1989 (RX 6) and his back has never returned to the **status quo ante** after that injury. Dr. Halperin treats Claimant's lumbar problems. Claimant also reinjured his back on January 22, 1991 (RX 7) and the Employer's Yard Hospital records reflect visits to the Yard Hospital by the Claimant between September 6, 1983 and April 9, 1987 for his various medical problems. (RX 8)

On August 23, 1996 Claimant was working on the 743 Boat and he injured his right shoulder while pulling on some heavy lines. He reported the injury to personnel at the Employer's Yard Hospital and the Employer authorized treatment by Dr. William R. Cambridge,

an orthopedic surgeon. (RX 1) Claimant continued to work although experiencing daily left leg and right shoulder pain. Claimant's October 18, 1996 right shoulder x-rays showed "some mild DJD (degenerative joint disease), "Cortisone was given" and the doctor prescribed "an MRI to evaluate the rotator cuff." (CX 1-1) That test showed "a rotator cuff tear with tendinitis." (CX 1-2) The surgery took place and, as of December 20, 1996, Dr. Cambridge prescribed "passive ROM in therapy" (CX 1-3) and the doctor kept him out of work because of his shoulder and knee problems. (CX 1 at 4-11)

Claimant who had been experiencing bilateral "chronic paresthesias radiating into both hands" required "nerve conduction studies" as of August 12, 1997 to further evaluate those symptoms. These tests led Dr. Cambridge to diagnose bilateral carpal tunnel syndrome and the doctor kept Claimant out of work because of his multiple medical problems. (CX 1 at 12-16) Dr. Cambridge opined, as of November 14, 1997, that it is "very unlikely that Mr. Brandes will ever return to work at General Dynamics" and that he needs "vocational rehabilitation because of the multiple injuries which include ulnar neuropathy, carpal tunnel, degenerative arthritis of the knee, shoulder impingement and low back problems." (CX 1-17) Dr. Cambridge and Dr. Halperin continue to see Claimant as needed. (CX 1 at 18-32, CX 2)

Claimant was examined on February 12, 1998 at the Employer's request by Dr. Philo F. Willetts, Jr., an orthopedic surgeon, and the doctor, after the usual social and employment history, his review of Claimant's medical records and diagnostic testing and the physical examination, states as follows in the February 12, 1998 ten (10) page report to the Employer (RX 4):

I examined James Brandes in my office today for his complaints of left knee pain, said to have been the result of an injury sustained in 1977. He said he also had right shoulder pain since August, 1996. Mr. Brandes is a 48 year old right handed rigger at Electric Boat Corporation. He said that he had been working for his employer for three and one-half years when he was hurt on-the-job in November, 1977. He provided the following history.

He said that, on November 4, 1977, while at work, a 500 pound iron shaft fell onto his left leg, causing a fracture. He said he was taken to Lawrence and Memorial Hospital, told of a fractured lower leg, and was treated by Dr. William Jones. He said that he was placed in a cast, a subsequent cast brace, but stated the fracture did not heal. He said that he returned to work in a brace with a nonunion.

He said that Dr. Jones subsequently performed an operation of the

left leg in May, 1979, at which time he placed a metal rod within the tibia and used a pelvic bone graft. He said that he was then at no work for two years and then light duty.

He said that he returned to work in 1981 but said that the rod gradually worked its way proximally into the left knee. He said that Dr. Jones again operated, opened up the area, and tapped down the rod into its previous position.

He said the rod again worked its way out and that he asked Dr. Jones to take it out. He said that Dr. Jones declined, so he then sought additional opinion with Dr. Richeimer at Backus Hospital.

He said that Dr. Richeimer did remove the rod and that his knee pain was somewhat better. He said that he subsequently returned to work after a few months.

He said that subsequently, he noted ongoing left knee pain, so Dr. Richeimer arthroscoped his knee and removed scar tissue and fluid from the knee. He said he was out of work for another eight weeks and then back to light duty.

He said that he subsequently has treated with Dr. Cambridge for some increased pain of the left knee. He said that Dr. Cambridge injected Cortisone to the knee on two occasions with no change in the symptoms.

He said that Dr. Cambridge most recently saw him for his left knee on January 12, 1998, and will next see him on February 13, 1998. He said he was told he was totally disabled.

He said that, currently, he takes aspirin and Tylenol.

He said that he had a feeling of unreliability of the left knee, had fallen because of it, felt a catching and sticking in the knee, as well as stiffness. He said that he would have increased pain with walking, getting up from a chair, using stairs, kneeling, squatting, flexing and extending the knee, and with cold, wet weather. He said he could sit for one-half hour, stand for ten minutes, drive for one-half hour, and walk 1/8 mile. He said that he got some relief from nonweight bearing, keeping the knee straight, and occasionally by using a cane.

He denied ever having had any injuries to his left lower extremity before 1977. He said that he had been in a motor vehicle accident in 1969 in Preston, Connecticut, and had sustained a laceration of the right forearm. He denied having had other injuries.

Mr. Brandes stated that he injured his right shoulder in August,

1996. He said that he was pulling shore power cables towards himself, when he felt a painful snap in his right shoulder. He said that he went to the Yard Hospital right away, was treated with ice, and advised to see his own physician. He then saw Dr. Cambridge for the first time for that shoulder condition in approximately September, 1996. He said that Dr. Cambridge obtained x-rays, subsequently sent him for an MRI, and told him that he had a rotator cuff tear.

He said that Dr. Cambridge performed surgery on his right shoulder on December 9, 1996. He said that he was subsequently sent to physical therapy at Norwich Rehabilitation.

He said that he still treats with Dr. Cambridge, having last seen him on January 12, 1998, and will next see him on February 13, 1998. He said that, overall, his right shoulder pain had been an original maximum level of 10 and is now at a current level of 8 or 9. He said that he reached maximum improvement with his right shoulder in March, 1997.

He said that he had increased pain with any motion of the shoulder. He said that he also had some neck discomfort with the extremes of motion. He said he got relief from avoiding the above.

He said that he had some numbness of the right fingers and some decreased gripping on the right.

He denied any previous shoulder injuries.

WORK STATUS: He said he was out of work between November, 1977, and January, 1979. He said that he then worked about five months and was out of work again between May, 1979, and May, 1981, following his surgical bone graft of the tibia. He said he then worked until approximately 1983 or 1984, when the metal rod worked its way proximally into the left knee. He said he was then out of work again six to eight weeks in 1985 after repeat arthroscopic surgery of the knee.

He said that he has been out of work since his surgery in 1996 through the present.

PAST MEDICAL HISTORY was said to be positive for treatment of a Lyme rash but no true Lyme disease. He denied other significant illnesses.

Surgery: The four left knee and lower extremity operations and the right shoulder surgery...

REVIEW OF SYSTEMS was said to be positive for some low back pain

and spondylolisthesis, for which he treated with Dr. Cambridge in January, 1998. He said he occasionally drank alcohol but did not smoke.

SOCIAL HISTORY shows that he is divorced. He has graduated from high school.

He served two years in the Marine Corps, including Vietnam. There was no service-related disability.

In the past, he worked as a laborer for B & R Construction in Connecticut from 1971 to 1974. He said he also worked as a gas station attendant during 1971.

He said he began work for Electric Boat Corporation in July, 1974. He said that his job involves lifting and handling materials. He said that he loves the job, rating it 10 out of 10, and felt he was rated okay in return. He said he might return but did not think he could do the standing and walking.

He said that, other than working at Electric Boat itself, he had not worked at all or in any capacity since 1977.

Currently, he said that he did housework one-half hour per day, shopped and ran errands one hour per day, visited friends one hour per day, watched television two hours per day, read two hours per day, and laid down for two hours per day.

In the future, he would like to be a building inspector. He said that he did very well on the written test for the City of Norwich but needed formal schooling to be able to compete for the job. He said he would like to get an Associate's Degree in Engineering to be able to do building inspector work.

Dr. Willetts gave the following diagnosis (**Id.**):

DIAGNOSIS:

1. More than 20 years status post fractured left tibia, subsequently healed, with 1 centimeter shortening.
2. Left knee pain, probably secondary to mechanical trauma from displaced intermedullary rod.
3. No clinical or radiological sign of any significant left knee arthritis.
4. Status post decompression surgery for impingement syndrome, right shoulder, with some residual pain and limited motion.
5. Mild carpal tunnel syndromes bilaterally.

DISCUSSION: I will try to respond to your questions in order as follows:

1. Is he currently disabled due to this injury and is it the sole cause of his disability?

He is partially disabled as a result of the injury of November 4, 1977, and is also partially disabled as a result of the injury of August 23, 1996, if the history be correct. Neither of these injuries is the sole cause of his disability.

2. If so, is he totally disabled or may he perform selected work?

He is not totally disabled. He may perform selected work.

3. If capable of light work, what restrictions would you place on him?

With respect to his right shoulder, he should avoid lifting, with his right hand, more than 20 pounds from floor to mid chest, more than 10 pounds to the shoulder level, and avoid lifting higher than the right shoulder level. He should avoid pushing or pulling more than 50 pounds with his right hand.

With respect to the positive electrical diagnostic tests and clinical tests supporting right carpal tunnel syndrome, he should avoid using vibrational tools and avoid rapid repetitive wrist and hand motions.

4. Has he reached a point of maximum medical improvement? Yes.

5. If so, when?

I believe he reached maximum medical improvement one year following his right shoulder surgery, or as of December, 1997.

He maintains that he never improved with his left lower extremity. However, he did sustain a fracture which subsequently healed. He was able to undergo removal of the intermedullary rod from his left tibia in 1983. I believe that his left tibial fracture healed maximally as of 1983. He subsequently noted left knee pain attributed to the slipping of the metal rod into the knee joint. I believe that he reached maximum medical improvement six months after his most recent left knee surgery, or by the end of 1985.

6. If so, what percentage of permanent functional loss of use pursuant to the fourth edition of the AMA guidelines does he have due to this condition? Please apportion the impairment specific to

the injury and the impairment attributable to the pre-existing conditions or factors.

Using as a guide The American Medical Association Guides to the Evaluation of Permanent Impairment, Fourth Edition, there is a permanent partial physical impairment determined as follows.

RIGHT SHOULDER: By virtue of having undergone a distal clavicular resection and decompression surgery to the left shoulder and using Table 27 on page 61 of the AMA Guides, Fourth Edition, there is a 10% permanent partial physical impairment of the left upper extremity.

> APPORTIONMENT: He denied previous injuries or problems with the right shoulder, and I am unaware of such. The medical notes about the time of his August, 1996, stated injury were not available to provide additional history of possible preexisting conditions. Thus, based upon the history available, his 10% right upper extremity impairment is a result of the August 23, 1996, work injury.

LEFT LOWER EXTREMITY: Based upon leg length discrepancy and using Table 35 on page 75 of the AMA Guides, there is no impairment.

Based upon leg muscle atrophy and with respect to a 4 centimeter decreased in left thigh circumference, there is a 13% permanent partial physical impairment of the left lower extremity.

Based upon decreased circumference of the left lower leg of 2 centimeters and using Table 37 on page 76, there is another 8% permanent partial physical impairment of the left lower extremity.

Using the Combined Values Chart on page 322 of the AMA Guides, these impairments combine, not add, to total 20% permanent partial physical impairment of the left lower extremity.

> APPORTIONMENT: Mr. Brandes denied preexisting injuries to the left lower extremity before November 4, 1977, and I am unaware of such. Accordingly, 20% permanent partial physical impairment of the left lower extremity is apportioned to the injury of November 4, 1977.

7. Are his injuries of 8/23/96 and 11/4/77 causally related to his employment at Electric Boat Corporation?

No contemporary records are available for the times of these injuries. If the above history be correct, the injuries of August 23, 1996, and November 4, 1977, were causally related to his

employment at Electric Boat Corporation.

8. Did he have any previous condition or injury which would combine with this injury to make his present injury materially and substantially greater?

He denied having significant injuries prior to November 4, 1977. Although he had been in a car accident in 1969 in Preston, Connecticut, with a lacerated right forearm, he denied any residual problem with that. Thus, there appears to be no previous injury that combined with the November 4, 1977, injury to produce greater injury than what would have been produced by the November 4, 1977, injury alone.

The November 4, 1977, injury, when combined with the injury of August 23, 1996, did produce materially and substantially greater injury than what would have been produced by the injury of August 23, 1996, alone.

9. Could you ask the claim if he has worked in any capacity since his injury? What physical activity does he engage in?

He said that, other than working at Electric Boat itself, he had not worked at all or in any capacity since the above injuries.

Currently, he said he did housework one-half hour per day, shopped and ran errands one hour per day, visited friends one hour per day, watched television two hours per day, read two hours per day, and laid down two hours per day.

10. Do you foresee any surgical intervention in the future for any of these injuries?

I do not believe there is a need for any surgical intervention for the right shoulder in the future.

It is possible that Mr. Brandes might be recommended to have some future arthroscopic surgery of his left knee based on complaints, however, there appear to be no surgical indications at this time.

I have read Dr. Cambridge’s note of December 12, 1997, with respect but, respectfully, disagree. The x-rays taken in this office today do not show severe or any significant arthritis of the left knee, and I do not believe that Mr. Brandes is a candidate for knee replacement surgery for the foreseeable future.

It is possible that he might undergo carpal tunnel surgery in the future, but not as a result of either of these injuries, according

to the doctor.

Claimant was referred to a pain management clinic and Dr. Richard T. Warner states as follows in his October 22, 1998 report (ALJ EX 4):

SUBJECTIVE: The patient returns to our pain management service for re-evaluation and management of his pain complaints. He underwent one lumbar epidural injection which he noted marked pain improvement for about one week. His pain then gradually returned to a level of 5 to 6 out of 10 today. Otherwise, he states that he has noticed a 10-20% overall improvement from his previous pain level both in his back and leg area.

OBJECTIVE: Physical examination demonstrates paravertebral musculature tenderness with trigger point areas. Otherwise, no acute change.

ASSESSMENT: Lumbosacral back and right greater than left leg pain secondary to multiple back injuries, spondylolisthesis, degenerative disk disease, myofascial pain syndrome lumbosacral gluteal region, neuropathic pain components.

PLAN: Our plan is to continue with our trial of epidural injections. Risks and benefits and all treatment options including doing nothing and observing were explained to patient. Risks including infection bleeding, worsening of pain, nerve injury, back injury, cardiopulmonary arrest, reaction to medication, paralysis and headache all were explained. The patient states that he understands. He desires to undergo procedure. All his questions are answered.

PROCEDURE: Lumbar epidural injection (#2)... The patient tolerated the procedure well.

Patient's post-procedure pain score remained the same based on the medication given. Band-Aid was placed over the area. Discharge instructions were given. He was sent home after appropriate monitoring. He already has scheduled follow up appointments, according to the doctor.

Claimant returned to the clinic on November 12, 1998 and Dr. Warner states as follows (ALJ EX 4):

SUBJECTIVE: The patient returns to our pain management service for re-evaluation and management of pain complaints. He has undergone two lumbar epidural injections and did not improvement (SIC) from the first injection. However, did

not notice (SIC) from a second injection. He, overall, has had a 10 to 20 percent improvement. However, he continues to complain of chronic lumbosacral back and leg pain. His pain score today is 4 to 6 out of 10.

OBJECTIVE: Physical exam demonstrates paravertebral muscular tenderness with trigger point area, otherwise no acute change.

ASSESSMENT: Lumbosacral back and right greater than left leg pain secondary to multiple back injuries, spondylolisthesis, degenerative disc disease, myofascial pain syndrome, lumbosacral gluteal region, neuropathic pain components.

PLAN: Our plan is to continue with lumbar epidural injections. The risks and benefits and all treatment options including doing nothing and observing were explained to the patient. Risks including infection, bleeding, worsening of pain, headache, paralysis, reaction to medication were all explained to the patient. The patient states that he understands. All his questions were answered. He desires to undergo procedure.

PROCEDURE: Lumbar epidural injection (No. 3)... The patient tolerated the procedure well. The patient's post-procedure pain score remained the same based on medication given. He did have some increased discomfort following the procedure due to increased pain in the paravertebral muscular regions of his right and left back area. Therefore, he was given 60 mg. of Toradol x1. He was sent home after appropriate monitoring. He will follow-up with Dr. Cambridge for further evaluation. He will return to us on a p.r.n. basis, according to the doctor.

Claimant saw Dr. Cambridge on November 17, 1998 and, according to the doctor's progress report (CX 1-29):

The patient has had epidural steroid injections and is not that much better. He carries a diagnosis of Grade I spondylolisthesis. He has severe chronic low back pain which he feels is getting worse.

Exam today reveals decreased ROM (Range of Motion) of the lumbar spine. He is neurologically intact.

We will refer him to Dr. Michael Halperin for surgical evaluation. It is clear that he is never going to return to his work as a rigger at General Dynamics . At this point he is not a candidate for gainful employment.

We will not give a permanent partial disability for injuries related to his lumbar spine at this time but because he lost a motion segment and probably two motion segments, his disability rating is going to be approximately 25% to 30% on his lumbar spine, according to Dr. Cambridge.

Dr. Halperin examined Claimant on December 1, 1998 and the doctor reported as follows (CX 2 at 2, 3):

REFERRED BY: Dr. William Cambridge.

CHIEF COMPLAINT: Lower back and right leg pain.

HISTORY: James is a 49 y/o former rigger at E.B. who is S/P an on-the-job injury for his lower back initially back on 1/13/89. He states that he slipped on ice, and fell on a reactor cover. He has had lower back problems since. He has been treated over the years by Dr. William Cambridge. He has been through P.T., and has received various medications. More recently he has undergone epidural steroid injections X 3. Despite this he remains symptomatic. Dr. Cambridge had obtained some x-rays of the lower back in January of this year. James is now referred here because of continued progressive pain in the lower back, radiating into the right leg.

PREVIOUS SPINE PROBLEMS: None.

PAIN PATTERN: James describes his present pain as being moderate in nature, but it seems to be getting gradually worse over time. The pain starts in the right side of the lower back, radiates into the buttock, into the posterior thigh, down to about the knee. He describes occasional numbness and tingling into the right foot. Denies any extremity weakness. Denies bowel/bladder dysfunction. Symptoms of pain are constant, and he cannot think of anything that relieves his pain...

PAST SURGICAL HISTORY: ORIF of fracture of the left leg. Arthroscopy left knee. Rotator cuff repair right shoulder...

DIAGNOSTIC STUDIES: AP and lateral **x-rays** of the LS spine done at Dr. Cambridge's office on 1/16/98 are here for review. This study reveals an isthmic (?) Grade I spondylolisthesis of L4 on L5, with about 6 mm. of slippage. There is disc space narrowing at this level, and anterior osteophytic spurs are noted both at L4 and L5. Mild degenerative changes are noted at the thoracolumbar junction, and also at the upper lumbar spine, but the L3-4 and L5-S1 discs appear to be relatively normal.

IMPRESSION: Isthmic spondylolisthesis of L4-5. Patient has radiculitis which has not responded to conservative therapy.

RECOMMENDATION: To go forth **with an MRI** of the lumbar spine. We will have James return here afterwards, according to Dr. Halperin.

The MRI of the lumbosacral spine took place on January 26, 1999 and Dr. Joel Gelber reported that the test showed Grade I spondylolisthesis at the L4-5 level with a small central disc protrusion at that level. (CX 2-7)

Claimant leads a mostly sedentary life as any physical exertion aggravates his multiple medical problems. He has agreed to undergo back surgery and then he will undergo a right carpal tunnel release, then perhaps one on the left side. He cannot engage in any employment because of his physical condition. He has applied for Social Security Administration disability benefits but that claim has not yet been ruled upon. No doctor has yet released Claimant to return to work. (TR 33-36, 44-46)

On the basis of the totality of this record and having observed the demeanor and heard the testimony of a credible Claimant, I make the following:

Findings of Fact and Conclusions of Law

This Administrative Law Judge, in arriving at a decision in this matter, is entitled to determine the credibility of the witnesses, to weigh the evidence and draw his own inferences from it, and he is not bound to accept the opinion or theory of any particular medical examiner. **Banks v. Chicago Grain Trimmers Association, Inc.**, 390 U.S. 459 (1968), **reh. denied**, 391 U.S. 929 (1969); **Todd Shipyards v. Donovan**, 300 F.2d 741 (5th Cir. 1962); **Scott v. Tug Mate, Incorporated**, 22 BRBS 164, 165, 167 (1989); **Hite v. Dresser Guiberson Pumping**, 22 BRBS 87, 91 (1989); **Anderson v. Todd Shipyard Corp.**, 22 BRBS 20, 22 (1989); **Hughes v. Bethlehem Steel Corp.**, 17 BRBS 153 (1985); **Seaman v. Jacksonville Shipyard, Inc.**, 14 BRBS 148.9 (1981); **Brandt v. Avondale Shipyards, Inc.**, 8 BRBS 698 (1978); **Sargent v. Matson Terminal, Inc.**, 8 BRBS 564 (1978).

The Act provides a presumption that a claim comes within its provisions. **See** 33 U.S.C. §920(a). This Section 20 presumption "applies as much to the nexus between an employee's malady and his employment activities as it does to any other aspect of a claim." **Swinton v. J. Frank Kelly, Inc.**, 554 F.2d 1075 (D.C. Cir. 1976), **cert. denied**, 429 U.S. 820 (1976). Claimant's uncontradicted credible testimony alone may constitute sufficient proof of

physical injury. **Golden v. Eller & Co.**, 8 BRBS 846 (1978), **aff'd**, 620 F.2d 71 (5th Cir. 1980); **Hampton v. Bethlehem Steel Corp.**, 24 BRBS 141 (1990); **Anderson v. Todd Shipyards**, **supra**, at 21; **Miranda v. Excavation Construction, Inc.**, 13 BRBS 882 (1981).

However, this statutory presumption does not dispense with the requirement that a claim of injury must be made in the first instance, nor is it a substitute for the testimony necessary to establish a "**prima facie**" case. The Supreme Court has held that "[a] **prima facie** 'claim for compensation,' to which the statutory presumption refers, must at least allege an injury that arose in the course of employment as well as out of employment." **United States Indus./Fed. Sheet Metal, Inc., v. Director, Office of Workers' Compensation Programs, U.S. Dep't of Labor**, 455 U.S. 608, 615 102 S. Ct. 1318, 14 BRBS 631, 633 (CRT) (1982), **rev'g Riley v. U.S. Indus./Fed. Sheet Metal, Inc.**, 627 F.2d 455 (D.C. Cir. 1980). Moreover, "the mere existence of a physical impairment is plainly insufficient to shift the burden of proof to the employer." **Id.** The presumption, though, is applicable once claimant establishes that he has sustained an injury, **i.e.**, harm to his body. **Preziosi v. Controlled Industries**, 22 BRBS 468, 470 (1989); **Brown v. Pacific Dry Dock Industries**, 22 BRBS 284, 285 (1989); **Trask v. Lockheed Shipbuilding and Construction Company**, 17 BRBS 56, 59 (1985); **Kelaita v. Triple A. Machine Shop**, 13 BRBS 326 (1981).

To establish a **prima facie** claim for compensation, a claimant need not affirmatively establish a connection between work and harm. Rather, a claimant has the burden of establishing only that (1) the claimant sustained physical harm or pain and (2) an accident occurred in the course of employment, or conditions existed at work, which could have caused the harm or pain. **Kier v. Bethlehem Steel Corp.**, 16 BRBS 128 (1984); **Kelaita**, **supra**. Once this **prima facie** case is established, a presumption is created under Section 20(a) that the employee's injury or death arose out of employment. To rebut the presumption, the party opposing entitlement must present substantial evidence proving the absence of or severing the connection between such harm and employment or working conditions. **Parsons Corp. of California v. Director, OWCP**, 619 F.2d 38 (9th Cir. 1980); **Butler v. District Parking Management Co.**, 363 F.2d 682 (D.C. Cir. 1966); **Ranks v. Bath Iron Works Corp.**, 22 BRBS 301, 305 (1989); **Kier**, **supra**. Once claimant establishes a physical harm and working conditions which could have caused or aggravated the harm or pain the burden shifts to the employer to establish that claimant's condition was not caused or aggravated by his employment. **Brown v. Pacific Dry Dock**, 22 BRBS 284 (1989); **Rajotte v. General Dynamics Corp.**, 18 BRBS 85 (1986). If the presumption is rebutted, it no longer controls and the

record as a whole must be evaluated to determine the issue of causation. **Del Vecchio v. Bowers**, 296 U.S. 280 (1935); **Volpe v. Northeast Marine Terminals**, 671 F.2d 697 (2d Cir. 1981); **Holmes v. Universal Maritime Serv. Corp.**, 29 BRBS 18 (1995). In such cases, I must weigh all of the evidence relevant to the causation issue. **Sprague v. Director, OWCP**, 688 F.2d 862 (1st Cir. 1982); **Holmes**, **supra**; **MacDonald v. Trailer Marine Transport Corp.**, 18 BRBS 259 (1986).

In the case **sub judice**, Claimant alleges that the harm to his bodily frame, **i.e.**, his torn rotator cuff, resulted from working conditions at the Employer's facility. The Employer has introduced no evidence severing the connection between such harm and Claimant's maritime employment. Thus, Claimant has established a **prima facie** claim that such harm is a work-related injury, as shall now be discussed.

Injury

The term "injury" means accidental injury or death arising out of and in the course of employment, and such occupational disease or infection as arises naturally out of such employment or as naturally or unavoidably results from such accidental injury. **See** 33 U.S.C. §902(2); **U.S. Industries/Federal Sheet Metal, Inc., et al., v. Director, Office of Workers Compensation Programs, U.S. Department of Labor**, 455 U.S. 608, 102 S.Ct. 1312 (1982), **rev'g Riley v. U.S. Industries/Federal Sheet Metal, Inc.**, 627 F.2d 455 (D.C. Cir. 1980). A work-related aggravation of a pre-existing condition is an injury pursuant to Section 2(2) of the Act. **Gardner v. Bath Iron Works Corporation**, 11 BRBS 556 (1979), **aff'd sub nom. Gardner v. Director, OWCP**, 640 F.2d 1385 (1st Cir. 1981); **Preziosi v. Controlled Industries**, 22 BRBS 468 (1989); **Januszewicz v. Sun Shipbuilding and Dry Dock Company**, 22 BRBS 376 (1989) (**Decision and Order on Remand**); **Johnson v. Ingalls Shipbuilding**, 22 BRBS 160 (1989); **Madrid v. Coast Marine Construction**, 22 BRBS 148 (1989). Moreover, the employment-related injury need not be the sole cause, or primary factor, in a disability for compensation purposes. Rather, if an employment-related injury contributes to, combines with or aggravates a pre-existing disease or underlying condition, the entire resultant disability is compensable. **Strachan Shipping v. Nash**, 782 F.2d 513 (5th Cir. 1986); **Independent Stevedore Co. v. O'Leary**, 357 F.2d 812 (9th Cir. 1966); **Kooley v. Marine Industries Northwest**, 22 BRBS 142 (1989); **Mijangos v. Avondale Shipyards, Inc.**, 19 BRBS 15 (1986); **Rajotte v. General Dynamics Corp.**, 18 BRBS 85 (1986). Also, when claimant sustains an injury at work which is followed by the occurrence of a subsequent injury or aggravation outside work, employer is liable for the

entire disability if that subsequent injury is the natural and unavoidable consequence or result of the initial work injury. **Bludworth Shipyard, Inc. v. Lira**, 700 F.2d 1046 (5th Cir. 1983); **Mijangos**, **supra**; **Hicks v. Pacific Marine & Supply Co.**, 14 BRBS 549 (1981). The term injury includes the aggravation of a pre-existing non-work-related condition or the combination of work- and non-work-related conditions. **Lopez v. Southern Stevedores**, 23 BRBS 295 (1990); **Care v. WMATA**, 21 BRBS 248 (1988).

This closed record conclusively establishes, and I so find and conclude, that Claimant's right shoulder problems, diagnosed as a torn rotator cuff, began with his August 23, 1996 shipyard accident, that the Employer had timely notice thereof, has authorized appropriate medical care and treatment and has paid appropriate compensation benefits to Claimant while he was unable to return to work and that he timely filed for benefits once a dispute arose between the parties. In fact, the principal issue is the nature and extent of Claimant's disability, an issue I shall now resolve.

Nature and Extent of Disability

It is axiomatic that disability under the Act is an economic concept based upon a medical foundation. **Quick v. Martin**, 397 F.2d 644 (D.C. Cir. 1968); **Owens v. Traynor**, 274 F. Supp. 770 (D.Md. 1967), **aff'd**, 396 F.2d 783 (4th Cir. 1968), **cert. denied**, 393 U.S. 962 (1968). Thus, the extent of disability cannot be measured by physical or medical condition alone. **Nardella v. Campbell Machine, Inc.**, 525 F.2d 46 (9th Cir. 1975). Consideration must be given to claimant's age, education, industrial history and the availability of work he can perform after the injury. **American Mutual Insurance Company of Boston v. Jones**, 426 F.2d 1263 (D.C. Cir. 1970). Even a relatively minor injury may lead to a finding of total disability if it prevents the employee from engaging in the only type of gainful employment for which he is qualified. (**Id.** at 1266)

Claimant has the burden of proving the nature and extent of his disability without the benefit of the Section 20 presumption. **Carroll v. Hanover Bridge Marina**, 17 BRBS 176 (1985); **Hunigman v. Sun Shipbuilding & Dry Dock Co.**, 8 BRBS 141 (1978). However, once Claimant has established that he is unable to return to his former employment because of a work-related injury or occupational disease, the burden shifts to the employer to demonstrate the availability of suitable alternate employment or realistic job opportunities which claimant is capable of performing and which he could secure if he diligently tried. **New Orleans (Gulfwide) Stevedores v. Turner**, 661 F.2d 1031 (5th Cir. 1981); **Air America v.**

Director, 597 F.2d 773 (1st Cir. 1979); **American Stevedores, Inc. v. Salzano**, 538 F.2d 933 (2d Cir. 1976); **Preziosi v. Controlled Industries**, 22 BRBS 468, 471 (1989); **Elliott v. C & P Telephone Co.**, 16 BRBS 89 (1984). While Claimant generally need not show that he has tried to obtain employment, **Shell v. Teledyne Movible Offshore, Inc.**, 14 BRBS 585 (1981), he bears the burden of demonstrating his willingness to work, **Trans-State Dredging v. Benefits Review Board**, 731 F.2d 199 (4th Cir. 1984), once suitable alternate employment is shown. **Wilson v. Dravo Corporation**, 22 BRBS 463, 466 (1989); **Royce v. Elrich Construction Company**, 17 BRBS 156 (1985).

An injury to the shoulder, even though it results in permanent partial impairment of the upper extremity, is not a so-called schedule injury under the Act. In this regard, **see Grimes v. Exxon**, 14 BRBS 573 (1981).

Sections 8(a) and (b) and Total Disability

A worker entitled to permanent partial disability for an injury arising under the schedule may be entitled to greater compensation under Sections 8(a) and (b) by a showing that he is totally disabled. **Potomac Electric Power Co. v. Director**, 449 U.S. 268 (1980) (herein "**Pepco**"). **Pepco**, 449 U.S. at 277, n.17; **Davenport v. Daytona Marine and Boat Works**, 16 BRBS 1969, 199 (1984). However, unless the worker is totally disabled, he is limited to the compensation provided by the appropriate schedule provision. **Winston v. Ingalls Shipbuilding, Inc.**, 16 BRBS 168, 172 (1984).

Two separate scheduled disabilities must be compensated under the schedules in the absence of a showing of a total disability, and claimant is precluded from (1) establishing a greater loss of wage-earning capacity than the presumed by the Act or (2) receiving compensation benefits under Section 8(c)(21). Since Claimant suffered injuries to more than one member covered by the schedule, he must be compensated under the applicable portion of Sections 8(c)(1) - (20), with the awards running consecutively. **Potomac Electric Power Co. v. Director, OWCP**, 449 U.S. 268 (1980). In **Brandt v. Avondale Shipyards, Inc.**, 16 BRBS 120 (1984), the Board held that claimant was entitled to two separate awards under the schedule for his work-related injuries to his right knee and left index finger.

On the basis of the totality of this closed record, I find and conclude that Claimant has established that he cannot return to work as a rigger. The burden thus rests upon the Employer to

demonstrate the existence of suitable alternate employment in the area. If the Employer does not carry this burden, Claimant is entitled to a finding of total disability. **American Stevedores, Inc. v. Salzano**, 538 F.2d 933 (2d Cir. 1976); **Southern v. Farmers Export Company**, 17 BRBS 64 (1985). In the case at bar, the Employer did not submit any evidence as to the availability of suitable alternate employment. **See Pilkington v. Sun Shipbuilding and Dry Dock Company**, 9 BRBS 473 (1978), **aff'd on reconsideration after remand**, 14 BRBS 119 (1981). **See also Bumble Bee Seafoods v. Director, OWCP**, 629 F.2d 1327 (9th Cir. 1980). I therefore find Claimant has a total disability.

Claimant's injury has become permanent. A permanent disability is one which has continued for a lengthy period and is of lasting or indefinite duration, as distinguished from one in which recovery merely awaits a normal healing period. **General Dynamics Corporation v. Benefits Review Board**, 565 F.2d 208 (2d Cir. 1977); **Watson v. Gulf Stevedore Corp.**, 400 F.2d 649 (5th Cir. 1968), **cert. denied**, 394 U.S. 976 (1969); **Seidel v. General Dynamics Corp.**, 22 BRBS 403, 407 (1989); **Stevens v. Lockheed Shipbuilding Co.**, 22 BRBS 155, 157 (1989); **Trask v. Lockheed Shipbuilding and Construction Company**, 17 BRBS 56 (1985); **Mason v. Bender Welding & Machine Co.**, 16 BRBS 307, 309 (1984). The traditional approach for determining whether an injury is permanent or temporary is to ascertain the date of “maximum medical improvement.” The determination of when maximum medical improvement is reached so that claimant's disability may be said to be permanent is primarily a question of fact based on medical evidence. **Lozada v. Director, OWCP**, 903 F.2d 168, 23 BRBS 78 (CRT) (2d Cir. 1990); **Hite v. Dresser Guiberson Pumping**, 22 BRBS 87, 91 (1989); **Care v. Washington Metropolitan Area Transit Authority**, 21 BRBS 248 (1988); **Wayland v. Moore Dry Dock**, 21 BRBS 177 (1988); **Eckley v. Fibrex and Shipping Company**, 21 BRBS 120 (1988); **Williams v. General Dynamics Corp.**, 10 BRBS 915 (1979).

The Benefits Review Board has held that a determination that claimant's disability is temporary or permanent may not be based on a prognosis that claimant's condition may improve and become stationary at some future time. **Meecke v. I.S.O. Personnel Support Department**, 10 BRBS 670 (1979). The Board has also held that a disability need not be “eternal or everlasting” to be permanent and the possibility of a favorable change does not foreclose a finding of permanent disability. **Exxon Corporation v. White**, 617 F.2d 292 (5th Cir. 1980), **aff'g** 9 BRBS 138 (1978). Such future changes may be considered in a Section 22 modification proceeding when and if they occur. **Fleetwood v. Newport News Shipbuilding and Dry Dock Company**, 16 BRBS 282 (1984), **aff'd**, 776 F.2d 1225, 18 BRBS 12 (CRT)

(4th Cir. 1985).

Permanent disability has been found where little hope exists of eventual recovery, **Air America, Inc. v. Director, OWCP**, 597 F.2d 773 (1st Cir. 1979), where claimant has already undergone a large number of treatments over a long period of time, **Meecke v. I.S.O. Personnel Support Department**, 10 BRBS 670 (1979), even though there is the possibility of favorable change from recommended surgery, and where work within claimant's work restrictions is not available, **Bell v. Volpe/Head Construction Co.**, 11 BRBS 377 (1979), and on the basis of claimant's credible complaints of pain alone. **Eller and Co. v. Golden**, 620 F.2d 71 (5th Cir. 1980). Furthermore, there is no requirement in the Act that medical testimony be introduced, **Ballard v. Newport News Shipbuilding & Dry Dock Co.**, 8 BRBS 676 (1978); **Ruiz v. Universal Maritime Service Corp.**, 8 BRBS 451 (1978), or that claimant be bedridden to be totally disabled, **Watson v. Gulf Stevedore Corp.**, 400 F.2d 649 (5th Cir. 1968). Moreover, the burden of proof in a temporary total case is the same as in a permanent total case. **Bell**, **supra**. **See also Walker v. AAF Exchange Service**, 5 BRBS 500 (1977); **Swan v. George Hyman Construction Corp.**, 3 BRBS 490 (1976). There is no requirement that claimant undergo vocational rehabilitation testing prior to a finding of permanent total disability, **Mendez v. Bernuth Marine Shipping, Inc.**, 11 BRBS 21 (1979); **Perry v. Stan Flowers Company**, 8 BRBS 533 (1978), and an award of permanent total disability may be modified based on a change of condition. **Watson v. Gulf Stevedore Corp.**, **supra**.

An employee is considered permanently disabled if he has any residual disability after reaching maximum medical improvement. **Lozada v. General Dynamics Corp.**, 903 F.2d 168, 23 BRBS 78 (CRT) (2d Cir. 1990); **Sinclair v. United Food & Commercial Workers**, 13 BRBS 148 (1989); **Trask v. Lockheed Shipbuilding & Construction Co.**, 17 BRBS 56 (1985). A condition is permanent if claimant is no longer undergoing treatment with a view towards improving his condition, **Leech v. Service Engineering Co.**, 15 BRBS 18 (1982), or if his condition has stabilized. **Lusby v. Washington Metropolitan Area Transit Authority**, 13 BRBS 446 (1981).

On the basis of the totality of the record, I find and conclude that Claimant reached maximum medical improvement on November 14, 1997 and that he has been permanently and totally disabled from November 15, 1997, according to the well-reasoned opinion of Dr. Cambridge. (CX 1-17) While Claimant may require additional surgery, such will not increase his residual work capacity but is palliative and will improve the quality of his life.

Medical Expenses

An Employer found liable for the payment of compensation is, pursuant to Section 7(a) of the Act, responsible for those medical expenses reasonably and necessarily incurred as a result of a work-related injury. **Perez v. Sea-Land Services, Inc.**, 8 BRBS 130 (1978). The test is whether or not the treatment is recognized as appropriate by the medical profession for the care and treatment of the injury. **Colburn v. General Dynamics Corp.**, 21 BRBS 219, 22 (1988); **Barbour v. Woodward & Lothrop, Inc.**, 16 BRBS 300 (1984). Entitlement to medical services is never time-barred where a disability is related to a compensable injury. **Addison v. Ryan-Walsh Stevedoring Company**, 22 BRBS 32, 36 (1989); **Mayfield v. Atlantic & Gulf Stevedores**, 16 BRBS 228 (1984); **Dean v. Marine Terminals Corp.**, 7 BRBS 234 (1977). Furthermore, an employee's right to select his own physician, pursuant to Section 7(b), is well settled. **Bulone v. Universal Terminal and Stevedore Corp.**, 8 BRBS 515 (1978). Claimant is also entitled to reimbursement for reasonable travel expenses in seeking medical care and treatment for his work-related injury. **Tough v. General Dynamics Corporation**, 22 BRBS 356 (1989); **Gilliam v. The Western Union Telegraph Co.**, 8 BRBS 278 (1978).

Interest

Although not specifically authorized in the Act, it has been accepted practice that interest at the rate of six (6) percent per annum is assessed on all past due compensation payments. **Avallone v. Todd Shipyards Corp.**, 10 BRBS 724 (1978). The Benefits Review Board and the Federal Courts have previously upheld interest awards on past due benefits to ensure that the employee receives the full amount of compensation due. **Watkins v. Newport News Shipbuilding & Dry Dock Co.**, 8 BRBS 556 (1978), **aff'd in pertinent part** and **rev'd on other grounds sub nom. Newport News v. Director, OWCP**, 594 F.2d 986 (4th Cir. 1979); **Santos v. General Dynamics Corp.**, 22 BRBS 226 (1989); **Adams v. Newport News Shipbuilding**, 22 BRBS 78 (1989); **Smith v. Ingalls Shipbuilding**, 22 BRBS 26, 50 (1989); **Caudill v. Sea Tac Alaska Shipbuilding**, 22 BRBS 10 (1988); **Perry v. Carolina Shipping**, 20 BRBS 90 (1987); **Hoey v. General Dynamics Corp.**, 17 BRBS 229 (1985). The Board concluded that inflationary trends in our economy have rendered a fixed six percent rate no longer appropriate to further the purpose of making claimant whole, and held that ". . . the fixed six percent rate should be replaced by the rate employed by the United States District Courts under 28 U.S.C. §1961 (1982). This rate is periodically changed to reflect the yield on United States Treasury Bills . . . ." **Grant v. Portland Stevedoring Company**, 16 BRBS 267, 270 (1984), **modified**

on reconsideration, 17 BRBS 20 (1985). Section 2(m) of Pub. L. 97-258 provided that the above provision would become effective October 1, 1982. This Order incorporates by reference this statute and provides for its specific administrative application by the District Director. The appropriate rate shall be determined as of the filing date of this Decision and Order with the District Director.

Section 14(e)

Claimant is not entitled to an award of additional compensation, pursuant to the provisions of Section 14(e), as the Employer has accepted the claim, provided the necessary medical care and treatment and voluntarily paid compensation benefits from November 27, 1996 to the present time and continuing. **Ramos v. Universal Dredging Corporation**, 15 BRBS 140, 145 (1982); **Garner v. Olin Corp.**, 11 BRBS 502, 506 (1979).

Section 8(f) of the Act

Regarding the Section 8(f) issue, the essential elements of that provision are met, and employer's liability is limited to one hundred and four (104) weeks, if the record establishes that (1) the employee had a pre-existing permanent partial disability, (2) which was manifest to the employer prior to the subsequent compensable injury and (3) which combined with the subsequent injury to produce or increase the employee's permanent total or partial disability, a disability greater than that resulting from the first injury alone. **Lawson v. Suwanee Fruit and Steamship Co.**, 336 U.S. 198 (1949); **FMC Corporation v. Director, OWCP**, 886 F.2d 1185, 23 BRBS 1 (CRT) (9th Cir. 1989); **Director, OWCP v. Cargill, Inc.**, 709 F.2d 616 (9th Cir. 1983); **Director, OWCP v. Newport News & Shipbuilding & Dry Dock Co.**, 676 F.2d 110 (4th Cir. 1982); **Director, OWCP v. Sun Shipbuilding & Dry Dock Co.**, 600 F.2d 440 (3rd Cir. 1979); **C & P Telephone v. Director, OWCP**, 564 F.2d 503 (D.C. Cir. 1977); **Equitable Equipment Co. v. Hardy**, 558 F.2d 1192 (5th Cir. 1977); **Shaw v. Todd Pacific Shipyards**, 23 BRBS 96 (1989); **Dugan v. Todd Shipyards**, 22 BRBS 42 (1989); **McDuffie v. Eller and Co.**, 10 BRBS 685 (1979); **Reed v. Lockheed Shipbuilding & Construction Co.**, 8 BRBS 399 (1978); **Nobles v. Children's Hospital**, 8 BRBS 13 (1978). The provisions of Section 8(f) are to be liberally construed. **See Director v. Todd Shipyard Corporation**, 625 F.2d 317 (9th Cir. 1980). The benefit of Section 8(f) is not denied an employer simply because the new injury merely aggravates an existing disability rather than creating a separate disability unrelated to the existing disability. **Director, OWCP v. General Dynamics Corp.**, 705 F.2d 562, 15 BRBS 30 (CRT) (1st Cir. 1983);

Kooley v. Marine Industries Northwest, 22 BRBS 142, 147 (1989); **Benoit v. General Dynamics Corp.**, 6 BRBS 762 (1977).

The employer need not have actual knowledge of the pre-existing condition. Instead, "the key to the issue is the availability to the employer of knowledge of the pre-existing condition, not necessarily the employer's actual knowledge of it." **Dillingham Corp. v. Massey**, 505 F.2d 1126, 1228 (9th Cir. 1974). Evidence of access to or the existence of medical records suffices to establish the employer was aware of the pre-existing condition. **Director v. Universal Terminal & Stevedoring Corp.**, 575 F.2d 452 (3d Cir. 1978); **Berkstresser v. Washington Metropolitan Area Transit Authority**, 22 BRBS 280 (1989), **rev'd and remanded on other grounds sub nom. Director v. Berstresser**, 921 F.2d 306 (D.C. Cir. 1990); **Reiche v. Tracor Marine, Inc.**, 16 BRBS 272, 276 (1984); **Harris v. Lambert's Point Docks, Inc.**, 15 BRBS 33 (1982), **aff'd**, 718 F.2d 644 (4th Cir. 1983); **Delinski v. Brandt Airflex Corp.**, 9 BRBS 206 (1978). Moreover, there must be information available which alerts the employer to the existence of a medical condition. **Eymard & Sons Shipyard v. Smith**, 862 F.2d 1220, 22 BRBS 11 (CRT) (5th Cir. 1989); **Armstrong v. General Dynamics Corp.**, 22 BRBS 276 (1989); **Berkstresser**, **supra**, at 283; **Villasenor v. Marine Maintenance Industries**, 17 BRBS 99, 103 (1985); **Hitt v. Newport News Shipbuilding and Dry Dock Co.**, 16 BRBS 353 (1984); **Musgrove v. William E. Campbell Company**, 14 BRBS 762 (1982). A disability will be found to be manifest if it is "objectively determinable" from medical records kept by a hospital or treating physician. **Falcone v. General Dynamics Corp.**, 16 BRBS 202, 203 (1984). Prior to the compensable second injury, there must be a medically cognizable physical ailment. **Dugan v. Todd Shipyards**, 22 BRBS 42 (1989); **Brogden v. Newport News Shipbuilding and Dry Dock Company**, 16 BRBS 259 (1984); **Falcone**, **supra**.

The pre-existing permanent partial disability need not be economically disabling. **Director, OWCP v. Campbell Industries**, 678 F.2d 836, 14 BRBS 974 (9th Cir. 1982), **cert. denied**, 459 U.S. 1104 (1983); **Equitable Equipment Company v. Hardy**, 558 F.2d 1192, 6 BRBS 666 (5th Cir. 1977); **Atlantic & Gulf Stevedores v. Director, OWCP**, 542 F.2d 602 (3d Cir. 1976).

Section 8(f) relief is not applicable where the permanent total disability is due **solely** to the second injury. In this regard, **see Director, OWCP (Bergeron) v. General Dynamics Corp.**, 982 F.2d 790, 26 BRBS 139 (CRT) (2d Cir. 1992); **Luccitelli v. General Dynamics Corp.**, 964 F.2d 1303, 26 BRBS 1 (CRT) (2d Cir. 1992); **CNA Insurance Company v. Legrow**, 935 F.2d 430, 24 BRBS 202 (CRT) (1st Cir. 1991). In addressing the contribution element of

Section 8(f), the United States Court of Appeals for the Second Circuit, in whose jurisdiction the instant case arises, has specifically stated that the employer's burden of establishing that a claimant's subsequent injury alone would not have caused claimant's permanent total disability is not satisfied merely by showing that the pre-existing condition made the disability worse than it would have been with only the subsequent injury. **See Director, OWCP v. General Dynamics Corp. (Bergeron)**, **supra**.

On the basis of the totality of the record, I find and conclude that the Employer has satisfied these requirements. The record reflects (1) that Claimant has worked for the Employer from July 10, 1974 to June 30, 1975 and from March 29, 1976 through November 26, 1997 (RX 5), (2) that Claimant fractured his left leg in two places in a very serious shipyard accident on November 4, 1977, (3) that that injury has resulted in four (4) surgical procedures to that leg, (4) that his left lower extremity has never returned to the **status quo ante** prior to November 4, 1977, (5) that his first back injury occurred in 1989, (6) that he reinjured his back in 1991 (or 1994), (7) that his work activities have also resulted in carpal tunnel syndrome, both hands, and that these symptoms first began in 1995, (8) that the Employer retained Claimant as a valued employee and provided light duty work as a crane operator for five (5) years because of his multiple medical problems (RX 8), (9) that he has sustained previous work-related industrial accidents prior to August 23, 1996, (10) while working at the Employer's shipyard and (11) that Claimant's permanent total disability is the result of the combination of his pre-existing permanent partial disability and his August 23, 1996 injury as such pre-existing disability, in combination with the subsequent work injury, has contributed to a greater degree of permanent disability, according to Dr. Willetts (RX 4) and Dr. Cambridge. (CX 1) **See Atlantic & Gulf Stevedores v. Director, OWCP**, 542 F.2d 602, 4 BRBS 79 (3d Cir. 1976); **Dugan v. Todd Shipyards**, 22 BRBS 42 (1989).

Claimant's condition, prior to his final accident on August 23, 1996, was the classic condition of a high-risk employee whom a cautious employer would neither have hired nor rehired nor retained in employment due to the increased likelihood that such an employee would sustain another occupational injury. **C & P Telephone Company v. Director, OWCP**, 564 F.2d 503, 6 BRBS 399 (D.C. Cir. 1977), **rev'g in part**, 4 BRBS 23 (1976); **Preziosi v. Controlled Industries**, 22 BRBS 468 (1989); **Hallford v. Ingalls Shipbuilding**, 15 BRBS 112 (1982).

Even in cases where Section 8(f) is applicable, the Special Fund is not liable for medical benefits. **Barclift v. Newport News**

Shipbuilding & Dry Dock Co., 15 BRBS 418 (1983), **rev'd on other grounds sub nom. Director, OWCP v. Newport News Shipbuilding & Dry Dock Co.**, 737 F.2d 1295 (4th Cir. 1984); **Scott v. Rowe Machine Works**, 9 BRBS 198 (1978); **Spencer v. Bethlehem Steel Corp.**, 7 BRBS 675 (1978).

Attorney's Fee

Claimant's attorney, having successfully prosecuted this matter, is entitled to a fee assessed against the Employer as a self-insurer. Claimant's attorney filed a fee application on July 26, 1999 (CX 10), concerning services rendered and costs incurred in representing Claimant between February 12, 1999 and July 19, 1999. Attorney David N. Neusner seeks a fee of $1,830.00 based on 8.75 hours of attorney time at $200.00 per hour and 1.25 hours of paralegal time at $64.00 per hour.

The Employer has filed a reply and has agreed to accept the requested attorney’s fee. (RX 9)

In accordance with established practice, I will consider only those services rendered and costs incurred after January 27, 1999, the date of the informal conference. Services rendered prior to this date should be submitted to the District Director for her consideration.

In light of the nature and extent of the excellent legal services rendered to Claimant by his attorney, the amount of compensation obtained for Claimant and the Employer's acceptance of the requested fee, I find a legal fee of $1,830.00 is reasonable and in accordance with the criteria provided in the Act and regulations, 20 C.F.R. §702.132, and is hereby approved.

ORDER

Based upon the foregoing Findings of Fact, Conclusions of Law and upon the entire record, I issue the following compensation order. The specific dollar computations of the compensation award shall be administratively performed by the District Director.

It is therefore ORDERED that:

1. Commencing on November 15, 1997, and continuing thereafter for 104 weeks, the Employer as a self-insurer shall pay to the Claimant compensation benefits for his permanent total disability, plus the applicable annual adjustments provided in Section 10 of the Act, based upon an average weekly wage of $1,071.39, such compensation to be computed in accordance with

Section 8(a) of the Act.

2. After the cessation of payments by the Employer, continuing benefits shall be paid, pursuant to Section 8(f) of the Act, from the Special Fund established in Section 44 of the Act until further Order.

3. The Employer shall receive credit for all amounts of compensation previously paid to the Claimant as a result of his August 23, 1996 injury on and after November 15, 1997.

4. Interest shall be paid by the Employer on any accrued benefits at the T-bill rate applicable under 28 U.S.C. §1961 (1982), computed from the date each payment was originally due until paid. The appropriate rate shall be determined as of the filing date of this Decision and Order with the District Director.

5. The Employer shall furnish such reasonable, appropriate and necessary medical care and treatment as the Claimant's work-related injury referenced herein may require, even after the time period specified in the first Order provision above, subject to the provisions of Section 7 of the Act.

6. The Employer shall pay to Claimant's attorney, David N. Neusner, the sum of $1,830.00 as a reasonable fee for representing Claimant herein before the Office of Administrative Law Judges between February 12, 1999 and July 19, 1999.

_____

DAVID W. DI NARDI
Administrative Law Judge

Dated:

Boston, Massachusetts

DWD:ln